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ECONOMIC ASPECTS OF LAND TITLES*

WALTER FAIRCHILD

Land is the source of all wealth and the basis of all sovereignty.¹ Security of tenure of land is vital to civilization. In America, title laws, although grounded in English tradition, have been tempered by the desire for freedom of access to land and equality in enjoyment by the people. Ancient feudal restrictions upon tenure and upon transfers of titles common to England have been modified by the modern trend toward commercial use of land.² Entails and trust estates have been largely abolished and replaced by fee title holdings.³

Both in England and in America, the fundamental concept is that the land belongs to the people. In England, this finds expression in the doctrine that the basic title of all land is in the Crown.⁴ New York State, in its Constitution,⁵ gives expression to the same thought:

"The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail, from a defect of heirs shall revert, or escheat to the people."

The American ideal of a free people with free institutions is based upon free land with equality of access to natural resources and with security of tenure. In early days, before the frontier of free land disappeared, it was possible for any citizen to obtain land upon which to exert his labor. Society, through its land laws, gave protection to the citizen in the enjoyment of the fruits of his labor by assuring to him absolute tenure of the land allotted to him, subject only to reasonable regulations for the general welfare and to the duty of support of the government through taxation.⁶ Grants from the State with power of alienation and succession became the rule of the land.

Security of tenure is necessary for the full development of land, because otherwise he who cultivates or improves land would not be able to preserve for himself the fruits of his labor. In its fundamental character, a private title to land is a franchise for the exclusive use of the land granted by society to the individual. Because land is not itself a product of labor and is not subject to consumption, an absolute title to land such as accrues to personal property is not possible. All that society can grant is an exclusive privilege of use.⁷

*A lecture on the Irvine Lectureship Foundation, delivered before the Cornell Law School April 25, 1936.

¹*Eminent Domain*, 10 R. C. L. 11.

²N. Y. CONST., art. 2, § 11.

³N. Y. CONST., art. 2, § 12.

⁴*People v. Rector of Trinity Church et al.*, 22 N. Y. 44 (1860).

⁵N. Y. CONST., art. 1, § 12.

⁶*Public Lands*, 3 Cyc. AM. Gov't 93.

⁷HENRY GEORGE, *PROGRESS AND POVERTY*, Book VII, c. 1.

From the Law Merchant, relating to dealings in products of labor, there have grown up our Negotiable Instruments Law and our Personal Property Law, relating to exchanges. Merchants demand simplicity, speed, and certainty in their commercial transactions. In early days, however, land was not the subject of commercial trading and did not have the benefit of the simple direct rules which governed commercial exchanges. The legal transfer of title to land was cumbersome and involved in a thousand expensive and time consuming technicalities. But the breaking up of land holdings and estates among the people, which found its best expression in America, has forced a simplified, commercial method of transferring title. Australia, New Zealand, Canada, and other new countries have followed a similar course.

The Torrens System

In South Australia, in 1858, Sir Robert Torrens introduced a method of transferring title to land similar to that required by the Shipping Act, which reflected the ledger-page concept of a businessman in keeping track of business.⁸ It is not the purpose of this paper to explain in any detail the Torrens System. Briefly, it involves the use of a title register with a ledger page for each separate parcel of land, and with a certificate of ownership⁹ which may be transferred like certificates of stock in a corporation. The total cost of transfer is the Registrar's fee, usually about five dollars. Each transfer automatically brings the title up to date. This system sweeps away the legal and mechanical obstructions to the transfer of title and, to that extent, tends to free land and make it a liquid asset.

The modern tendency of the law is to treat personal property and real property alike with respect to procedure for passing title, although progress along this line for real property is slow and usually opposed by special interests. The economic loss to the community because of the continuance of ancient restrictions upon the free use of land and upon the transfer of the right to such use has been enormous and has contributed in major part to the industrial upsets which we commonly call "depressions."

Title Examinations

The repeated examination of title by lawyers and title companies is a tremendous financial burden amounting to hundreds of millions of dollars annually in the United States. It is estimated that in New York City alone the payments to title companies have been upwards of ten million dollars a year.

⁸*Records*, 23 R. C. L. 273.

⁹*Records*, 23 R. C. L. 277.

Foreclosure of Mortgages

Foreclosure of mortgages, devised originally in equity for the protection of the helpless borrower against the greed of the money-lender, has degenerated into a legalistic ritual which burdens the borrower and often fails to protect him.¹⁰ In mortgage foreclosures, the appointment of a referee to compute the amount due,¹¹ the public advertising of the sale, and the sale itself, all originally planned for the protection of the landowner, are now added burdens upon his back.

• In the intervals between depressions, when the money-lender was able to recoup from the sale of the property his entire loan plus foreclosure expense, little was heard of the grievous burden of foreclosure costs. During the depression which invariably follows a period of inflation of land values with mortgages inflated in proportion, sales by foreclosure usually bring less than the mortgage debt, thus throwing the payment of foreclosure expenses directly upon the foreclosing mortgagee. As a result, a great outcry has arisen from savings banks, trustees, and other money-lenders, who belong to the articulate side of society, and who now find that the mortgage costs come out of their pockets and not out of the pockets of the borrower. In the long run, however, the burden of mortgage foreclosures is not borne by the money-lender, because in the last analysis the entire value of property is and necessarily must come from the labor of the people.

An examination has been made regarding the cost of passing title under foreclosure.¹² It is not intended to advocate the removal of safeguards against the summary loss of property by owners, nor to criticise the reasonable postponements of foreclosure provided by moratorium laws for the protection of owners during a crisis. The writer speaks only of the cost of transferring title resulting from the foreclosure of mortgages.

The Borough of Queens in New York City, is a typical home-owning community, with about 175,000 home-owners. In Queens, for six years, 1930 to 1935 inclusive, there were 32,992 notices of lis pendens filed. All but 2.5 per cent were for the foreclosure of mortgages. Of these actions, 22,576 foreclosures went through to completion, leaving 10,416 actions which are pending or were settled during foreclosure. The average cost of each completed foreclosure was \$546.54. This means that the landowners, of Queens County, chiefly home-owners, in six years paid out upwards of \$12,000,000 for the cost of foreclosing mortgages. This is additional to the economic property losses resulting from the foreclosures. This \$12,000,000

¹⁰See Sutherland, *Foreclosure and Sale: Some Suggested Changes in the New York Procedure* (1937) 22 CORNELL L. Q. 216.—Ed.

¹¹N. Y. CIV. PRAC. RULE 265; N. Y. CIV. PRAC. ACT (1920) § 1546.

¹²*Report of Investigation on Cost and Procedure of Mortgage Foreclosure*, SURVEY OF REAL ESTATE LAWS, U. S. W. P. A. PROJECT No. 352 (1936) pp. 4-5.

expense is merely for the transfer of title.¹³ This situation is not peculiar to Queens County, but is duplicated throughout the State of New York and the United States.

The administration of mortgage foreclosures has become a political and economic scandal. The appointment of referees and auctioneers is political patronage. Legal advertising often goes to political racket sheets printed solely for that purpose. Statutory allowances and special allowances by the Court to attorneys are more than one-half of foreclosure expense.¹⁴ The writer does not mean to infer that the foreclosing attorney performs no labor. It is probable that the time consumed by the cumbersome foreclosure machinery justifies the attorney's charges. But this is not to say that the legal machinery is justified, because in the last analysis all that is done is merely to transfer title from the foreclosed owner to the purchaser.

The remedy is obvious. Abolish the law action form of foreclosure and substitute for it a simple official proceeding conducted by an officer of the court, with notice to all interested, in a manner similar to the Torrens System which would reduce the cost of foreclosure in ordinary cases to \$40 or \$50.¹⁵ This applies with equal force to the technicalities of all proceedings which result in a judicial sale of land, such as partition, infancy proceedings, sales under execution, and the like.

Every sale by order of court should be by an official and binding proceeding in rem against the land itself, conclusive against the world. It is a major defect of the present foreclosure system that the judgment of sale is not binding upon persons not served with process, which often results in an unmarketable title.¹⁶ The buyer at a judicial sale should receive a certificate of title on which he may rely and which he may transfer without question as to the regularity or sufficiency of the proceedings.

Collection of Taxes

The burden of antiquated land laws is nowhere more apparent than in the collection of taxes by the community. It is basic law that the title of the state or sovereign is paramount. Under the general tax law, a deed delivered on a valid tax sale gives title in fee. Because of loose administration of law, however, so-called tax titles are generally considered unmarketable. The result of this has been the accumulation in the tax offices of great numbers of parcels of land which are out of the market and, having ceased to be taxable, no longer contribute to the expense of government.

¹³*Report of Investigation on Cost and Procedure of Mortgage Foreclosure*, U. S. W. P. A. PROJECT 65-97-352, SURVEY OF REAL ESTATE LAWS (1936) table I.

¹⁴N. Y. CIV. PRAC. ACT, §§ 1512, 1513.

¹⁵*Supra* note 12, at 15.

¹⁶N. Y. CIV. PRAC. ACT, §§ 1079, 1085.

Suffolk County alone has more than 100,000 lots of land held by the county as a result of tax sales. Suffolk County cannot market these parcels of land because of the weakness of tax sale procedure. Pretended partition suits have been resorted to by title companies and others as a cure for tax titles. The expense of the procedure, however, running into hundreds of dollars, forbids its use in clearing titles to land having small value.

The Court of Appeals in 1926, in an opinion by Judge Cardozo, affirmed the constitutionality of the Torrens System.¹⁷ Following this decision, thousands of lots of land clouded by tax sales were registered in Suffolk County. The treasurer of Suffolk County is reported as saying that in one year more than \$100,000 was taken in by his county for back taxes on land registered under the Torrens System which theretofore had paid no taxes for many years. The ability to register an entire development in one proceeding, sometimes covering thousands of lots, has brought down the cost of registering individual lots to a few dollars, sometimes as low as \$5.00 or \$6.00 a lot. Collection of back taxes, however, is the smaller part of the benefit. The real benefit is in the return of land into use. Homes are built, activity revives, current taxes paid to the community increase.

Foreclosure of Tax Liens

As an attempted escape from the unmarketability of tax titles, tax laws in some localities have been amended to provide for the sale of tax liens to private parties instead of direct sales of the land by the municipality.¹⁸ In New York City, and to some extent elsewhere, the city no longer sells land for unpaid taxes, but sells a tax lien which the buyer must foreclose as if it were a mortgage. This subjects tax liens to all of the burdens and defects of the mortgage foreclosure system.

In many parts of Staten Island, Queens, Bronx, Brooklyn, and sometimes in Manhattan itself, the cost of foreclosing the tax lien exceeds the value of the lot. The result has been that the city is virtually unable to collect its back taxes. There are numerous instances where taxes have accumulated for ten, fifteen, or twenty years. In Staten Island, in March 1936, the Finance Department held a tax lien sale of over two hundred parcels, mostly vacant land and one-family houses. Not one was sold. The Queens County experience is little better. In Brooklyn the situation is so bad that the City Collector takes ten dollars "on account" to postpone the sale.

A vicious result of the system of selling tax liens is that the City is virtually "farming out" the collection of taxes to private parties. This gives rise to the notorious activities of "tax sharks" who are able to prey upon

¹⁷City of New York v. Wright *et al.*, 243 N. Y. 80, 152 N. E. 472 (1926).

¹⁸N. Y. Laws 1935, c. 345; Studenski, *Private Financing of Delinquent Taxes* (July, 1936) REAL ESTATE NEWS p. 232.

owners in default, by exacting pretended foreclosure costs in addition to penalty charges. When the "tax shark" cannot make a profit he attempts to hand back the title to the city under a claim of some irregularity in procedure, which his sharp lawyer usually can find. It is difficult to estimate the amount that the municipalities of the State of New York have lost in unpaid taxes from this cause. It is conservative to say that it would run into hundreds of millions of dollars.

Failure of the tax office to list owners correctly results in loss of taxes to the community and embarrassment to the property owners. In every county there are thousands of parcels of land omitted from the tax roll because of the faulty method of keeping tax records by name.

Speculation in Vacant Lots

The failure to collect taxes when due leads to speculation in vacant land. The Westchester County Commission on Government reported in 1935 that in Westchester County there are 90,678 parcels of improved land as against 132,124 vacant parcels. The vacant parcels of land, exclusive of those in White Plains, are responsible for 52.5% of all unpaid taxes and assessments in that county. Of 60,294 properties in arrears in the county as a whole, exclusive of White Plains, 50,521 consisted of lots in subdivisions and of unimproved and vacant parcels of acreage.¹⁹ In Yonkers alone, the arrears, for 1932 and 1933 tax years only, on vacant land were \$1,245,609.47 or 25.2% of the total of such arrears.²⁰ The shrewd speculator in vacant lands in Westchester County pays no taxes because he has found out that the County is unable to enforce collection because of the expense of tax sales and the unmarketability of tax titles. Confusion is increased by the multiplicity of tax laws in Westchester County. There are four cities and eighteen towns, each of which exercises local autonomy in the foreclosure of tax liens. The cost and confusion here referred to has nothing to do with the safeguards which the law may properly give for the protection of taxpayers who may be in arrears. The writer refers here only to the loss resulting from defective laws for the mere transfer of title.

The remedy is simple. All that is required is a direct sale by the county by a simple procedure, on notice to owners, resulting in a certificate of sale to a buyer, which is final and conclusive and which may be transferred at a nominal cost. This is a simple application of the Torrens System to tax sales.

Loss to Commerce

We have outlined what may be termed the direct economic waste of title

¹⁹(Dec. 13, 1935) LAND USE AND LOCAL FINANCE, *Westchester Co. Comm. Rep.*

²⁰*Ibid.* Figures from official study by City of Yonkers, Jan. 23, 1934.

procedure. There remains a greater loss which is commercial, that is, the loss of time in passing title, often two or three months, during which all business relating to the property is stopped or curtailed. The loss to commerce because of defective titles, loss of sales and of commissions, land made idle because of unmarketability of title; all these add up to a tremendous sum chargeable to defective land laws. Idleness of land, resulting from unmarketability of title, contributes to the idleness of labor and is a major factor causing business depression. The loss in this respect is incalculable.

Land Title Control

Control of the title to land involves the control of the land itself. Control of land results in the control of everything placed on the land.

Under our defective recording system, there grew up in the City of New York, in the hands of four or five title companies and their affiliates, the ability to dictate with respect to the title to land. Under the prestige of the title company system developed over a period of forty years from 1890, a title that was not insured by one of the controlling companies came to be considered unmarketable. Savings banks, insurance companies, and lending institutions became associated with the title companies. The control of title insurance policies brought with it not only a large financial return but also the power to control mortgage loans, so that the mortgage business became concentrated in the hands of the title companies and their affiliated institutions. The ability to control mortgage loans carried with it the power to dictate the character of the building. The plans of the owner's architect were subject to approval by architects associated with the title companies. The surveying business became an adjunct of the title companies. Contractors favored by the title companies were forced on builders. Eventually construction companies were owned or controlled by the title companies. An interesting sidelight of this phase of the construction business is given in a series of articles in current issues of the *Saturday Evening Post* by Mr. Louis J. Horowitz, former president of the Thompson-Starrett Construction Company.²¹ This company, which built many of the largest buildings in this country, was controlled by the Title Guarantee and Trust Company.

The concentration of power to control titles, mortgage loans, architects, surveyors, and building construction brought with it a favored inside group of operators and brokers who formed a monopolistic ring in New York City, with whom every broker had to deal in some form or another in order to have his project advanced. So rapid and complete was this movement that by the year 1920 the control of real estate operations in New York City, with

²¹*Towers of New York*, SAT. EVE. POST: Feb. 15, 1936, pp. 5-7; Feb. 29, 1936, pp. 18-19; March 14, 1936, pp. 18-19; March 28, 1936, pp. 20-21; April 11, 1936, pp. 24-25; April 25, 1936, p. 35 *et seq.*

public financing and promotion of the sales of securities for such financing, was in the hands of the title companies and affiliated institutions and firms. So strong was the hold of this system on public esteem, because of shrewd publicity methods, that the sale of mortgage securities and mortgage participation certificates was accomplished without any investigation on the part of the buying public, as to the value of the properties underlying the securities.

This unhealthy, unregulated control of real estate and the almost unlimited public demand for mortgage securities resulted in over-valuation and over-development accompanied by actual corruption in which ordinary rules of honesty were forgotten by presumably respectable institutions and individuals. The inevitable collapse of this top-heavy structure based on economically unsound conditions has resulted in losses to the community running into billions of dollars. It is not necessary here to go into detailed figures. The public press and the reports of the Alger Commission and the State Mortgage Commission graphically tell the story already familiar to hundreds of thousands of our citizens who lost the savings of a life time.

It is not contended that defective land laws are the sole cause of these enormous losses, but it is true that, if direct and simple commercial methods for dealing in land titles had been the rule, it would not have been possible for the institution of title companies and their methods to develop. It is significant that in Canada, where the Torrens System of title is practically universal, there are no title companies²² and there has been no mortgage security scandal.

Nature of Land Title

There is a fundamental difference between land and personal property. It is customary to speak of title to land as being in fee simple, or held absolutely and forever. In the nature of things, however, it is impossible to grant an absolute perpetual title to land. All that it is possible for society to grant is an exclusive privilege to use the land. A land title is a franchise for use. Title to land differs from title to personal property in a degree as marked as the difference between land and personal property. To take a homely example: the owner of a hen who lays an egg may be said to have title to the egg in an absolute and complete sense because it is possible for him actually to consume the egg. The title to the egg, however, disappears with its consumption. But land cannot be consumed; it can only be used. What society grants is the assurance of quiet and exclusive use of land with absolute title to the product of labor on the land. A land title is perpetual only in the sense that it may continue as long as the government which granted the use continues. Land itself survives the life of government, but title to land disappears with the disappearance of the government.²³

²²Jerome Beatty, *Is Your Title Clear?* (Feb., 1936) READER'S DIGEST.

²³HENRY GEORGE, *PROGRESS AND POVERTY*, Book VII, c. 1.

Conceiving of a land title as a franchise, it follows that the community is directly and vitally concerned in the value of the franchise. Land titles and land values are both the creatures of government. The value of land is the measure of the value of the privilege of using a land site. Upon proper regulation of the use of land depends the welfare of society.²⁴ It is axiomatic that the welfare of a community depends upon the stability of title to land. On the other hand, the state must draw upon the use of land for its support. The state supplies the vital economic link between title to land and its use. In exercising the power of taxation for its support the state is necessarily dependent upon the security of tenure of land and its proper use.

Zoning

A tremendous factor affecting private title to land is the power of regulation and zoning. Zoning laws have come to the front in recent years. City planning is becoming recognized as an accepted function of government. Excess condemnation, which involves the power to take more land in the neighborhood of highways or other public improvements than is directly required for the improvement itself, is a further example of the exercise of government over private titles.

It is commonly thought that the exercise of the powers of taxation, zoning, and condemnation is an interference with private titles to land. This is not so. The true viewpoint is rather to be found in the basic recognition that land is the common property of all the people, and that private title is but the privilege of use granted to an owner, subject to the fundamental general right of regulation and taxation by the State.

Land titles become important as land becomes valuable. The activities of the people, expressed through community growth and governmental enterprise, may and do cause the value of the franchise or title to land to fluctuate. Land value rises or falls, or disappears entirely, according to the activities of the people. The great problem facing every community today is how to preserve the private tenure of land in such a way as to assure the fruits of his labor to him who improves land, and at the same time preserve for the community its power of regulation and its right of taxation. The failure to solve this problem bears the seed of the possible destruction of the community itself. In our great cities today, through the failure of proper application of zoning regulations, and because of unequal distribution of taxation burdens, large areas of valuable land have become blighted with unsanitary slums. This is recognized today as one of the great unsolved problems of city life. The disastrous consequences of our inadequate land laws are found not only in the economic loss from the blight of outmoded buildings, amount-

²⁴HENRY GEORGE, PROTECTION OR FREE TRADE, c. 26.

ing to billions of dollars, but also in the irreparable damage to the health, morals, and education of the community.

Our free institutions today are no less dependent upon the security of tenure of land and equality in its enjoyment, than they were in colonial days. The security of government is likewise just as dependent today upon the adequate collection of taxes for the support of the government as formerly. Nor has the fundamental concept changed that the land belongs to the people. Even zoning laws and city planning, although of recent development, are by no means foreign to the traditional concern of our free institutions with the welfare and health of the community. Only the burdens of increasingly complicated, contradictory, and stifling land laws are out of step with the growth of our free institutions and with the march of civilization itself.

If the very freedom of our institutions rests upon sound, simple, and direct land laws, if the stability of these institutions is threatened by antiquated, cumbersome, and stifling land laws, then the remedy lies in a complete revision and simplification of our land laws.

Concentration of Title Holding

Land is a natural resource and the private holding of land is a natural monopoly which tends to a concentration of land holding.

The history of titles in this country presents three phases. First, the holding of large estates in a few hands similar to the feudal system. Large grants to the Duke of York, Lord Baltimore, William Penn, General Oglethorpe, and others were typical of our Colonial days. The breaking up of these large grants into small individual holdings followed the Revolution and continued until about the year 1890. During this period, the number of titles not only increased in the aggregate but increased in proportion to population. Land went through the process of commercial development and was largely sold in individual lots. Manhattan Island, starting with a single title from the Indians, became divided into 77,000 individual lots. In Greater New York there are 813,000 separately assessed parcels. From 1890, however, to the present day, the trend has been in the opposite direction, towards a concentration of titles. Today, Manhattan Island, with a population of nearly two million people, with 77,000 separate lots, has about 40,000 title holders. Of these 40,000 landowners in Manhattan, about 35,000 own single lots having relatively small value. These small holders are the rapidly disappearing homeowners of a preceding generation. The bulk of the four billions of land value in Manhattan today is owned by about 5,000 people. Less than one per cent of the population own approximately 95% of the land value. The number of landowners in Manhattan Island is steadily decreasing not only in the aggregate but also in proportion to population.

The New York City Housing Authority, under the sponsorship of Tenement House Commissioner Langdon W. Post, with cooperation of the United States Works Progress Administration, has made a study of the effects of what is termed "day-time population and night-time population." Population maps have been prepared from this data which in graphic style illustrate population trends.²⁵ The Department of Taxes and Assessments of the City of New York has prepared Land Valuation Maps which show land values in the five boroughs.²⁶ These land valuation maps are not made up from studies of the factors of population, but from actual data of property income, sales, mortgages, and other transactions of the market which determine land values in actual trading.

There are but two uses for land: first, for homes, and second, for business. Intelligent zoning, coupled with apportionment of the tax burden according to usefulness, would leave ample space for homes without congestion. The elimination of speculative holding of residence land out of use and held under the lure of the possibility of commercial development would open large areas for residential purposes and eradicate slums.

To conclude, the state has protected the individual by assuring security of tenure in granting private titles, which we have observed is in the nature of a franchise for the exclusive use of land. In return it would seem obvious that the citizen owes to the state the duty of putting the land to proper use and also of paying to the state for the general support of government the fair value of his special privilege.

²⁵REAL PROPERTY INVENTORY, CITY OF NEW YORK (1934) pp. xiii-xiiii.

²⁶TENTATIVE LAND VALUE MAPS OF THE CITY OF NEW YORK (1936).